

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BEARBOX LLC, et al.,)
)
Plaintiffs,) C.A. No. 21-534-MN-CJB
)
v.)
)
LANCIUM LLC, et al.,)
)
Defendants.)

Monday, May 23, 2022
1:00 p.m.

BEFORE: THE HONORABLE CHRISTOPHER J. BURKE
United States District Court Judge

APPEARANCES:

ASHBY & GEDDES
BY: ANDREW MAYO, ESQ.

-and-

MARSHALL, GERSTEIN & BORUN
BY: JOHN LABBE, ESQ.
BY: BENJAMIN HORTON, ESQ.

Counsel for the Plaintiff

1 APPEARANCES CONTINUED:

2

3 BARNES & THORNBURG
4 BY: CHAD STOVER, ESQ.
BY: ADAM KAUFMANN, ESQ.
BY: MARK NELSON, ESQ.

5 Counsel for the Defendant

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1 THE COURT: Good afternoon,
2 everyone. It's Judge Burke here. Can everyone
3 hear me okay?

4 COUNSEL: Yes, Your Honor.

5 THE COURT: All right. I know our
6 court reporter is with us and we thank our court
7 reporter for their service and let's go on the
8 record in light of that and as we do let me just
9 say a few things for the record. The first is
10 that we're here this afternoon by way of
11 teleconference in the matter of BearBox LLC, et
12 al, versus Lancium LLC, et al. It's civil
13 action number 21-534-MN-CJB here in our court.
14 And we're here for a teleconference to hear
15 brief argument on the pending motion to dismiss
16 filed by the defendant's side.

22 MR. MAYO: Good afternoon, Your
23 Honor. This is Andrew Mayo from Ashby & Geddes
24 on behalf of the plaintiff, BearBox and Austin

1 Storms. I am joined this afternoon by my
2 co-counsel from Marshall, Gerstein & Borun, you
3 have Benjamin Horton and John Labbe on the line.

4 THE COURT: All right. And Mr.

5 Mayo, who will be addressing the issues today?

6 MR. MAYO: Mr. Horton, Your Honor.

12 MR. STOVER: Good afternoon, Your
13 Honor. Chad Stover from Barnes & Thornburg for
14 defendants and with me are my partners Adam
15 Kaufmann and Mark Nelson and Mr. Kaufmann will
16 be addressing the Court this afternoon on this
17 motion.

18 THE COURT: Okay. Thank you.

19 Thanks to all. All right. Counsel, as you
20 know, the motion to dismiss implicates two
21 claims that are in the current iteration of the
22 operative complaint. One is a conversion claim
23 and then the second is the unjust enrichment
24 claim. There is one argument for dismissal of

1 the conversion claim and for the unjust
2 enrichment claim, there are a few different
3 arguments. There, the arguments are related to
4 the fifth element of the claim on the one hand
5 and they will relate to the federal preemption
6 argument on the other. Why don't we first deal
7 with the arguments about the conversion claim
8 and after we hear argument on that, we can move
9 on to the unjust enrichment claim. On that
10 front, let me then turn first to defendant's
11 counsel and, Mr. Kaufmann, I'll turn to you and
12 I'll just have a few questions and I'll
13 certainly let you add anything else that you
14 wish to add from your briefing if it's not
15 something we get into via my questions.

16 And so with regard to the
17 conversion issue, you know, a lot of this comes
18 down to your argument that when it comes to
19 Louisiana law, what has to be pleaded and
20 established is that in some way what's alleged
21 here is an instance of a party depriving the
22 owner of possession of information or the
23 ability to use the property or the information.
24 And here your basic assertion is that the

1 complaint doesn't plead that because the
2 information at issue was transferred
3 electronically and it's clear from the
4 allegations that the plaintiff retained a copy
5 of it and so the plaintiff never lost -- was
6 never deprived of possession of the information
7 or the ability to use it.

10 MR. KAUFMANN: Yes, Your Honor, I
11 think you have. I guess maybe one point of
12 clarification I would make is you're correct
13 that the primary basis for our claim is that
14 there's been no alleged deprivation of the
15 converted property. I will say I think there's
16 two aspects to the allegation of what the
17 converted property is. The second amended
18 complaint refers to conversion of some actual
19 electronic documents, but also know-how is one
20 of the things that is allegedly converted. And
21 to the extent that know-how is not tied to
22 physical things, physical documents or
23 electronic documents, our position is that would
24 also be, you know, not the proper subject matter

1 of a conversion claim because it's intangible.
2 Know-how divorced from any physical document is
3 intangible and can't be converted and then of
4 course for the electronic documents, there was
5 no deprivation and so there can also been no
6 conversion.

7 THE COURT: I don't remember this
8 know-how issue coming up from the briefing. My
9 memory of the briefing, what the parties were
10 arguing about there, it seemed to be understood
11 that yes, the information that is alleged to
12 have been converted was information that was
13 sent electronically and obtained electronically
14 and that presumably stored electronically at
15 defendant's side. Did the parties get into
16 this -- do you disagree? Did the parties talk
17 about what you were just talking about now in
18 the briefs?

19 MR. KAUFMANN: Well, Your Honor,
20 I'd just point out that in our brief the way the
21 claim has been alleged refers to know-how as
22 we've noted in our briefing as well. But you're
23 correct, I don't believe there's any dispute
24 that what was converted was electronic

1 documents.

2 THE COURT: Okay. And then I
3 guess, you know, there was some back and forth
4 about whether under the Louisiana law electronic
5 information or documents can be the type of
6 property that could be converted. And at some
7 point I guess certainly about the time of the
8 reply brief you acknowledged, yes, that's true,
9 we're not saying on the defendant's side that
10 electronic information can't be converted. And
11 I guess my question there to you was, in your
12 view is the only way that electronic information
13 can be converted is if a party either literally
14 kind of takes the electronic information
15 physically, you know, say, for example, like in
16 one of the cases is information on a hard drive,
17 and takes that hard drive and takes it away from
18 the plaintiff or if the defendant's side, you
19 know, deletes or gets rid of the electronic
20 information? Put differently, in your view, is
21 there any way that you can convert electronic
22 information simply by receiving it, you know,
23 via like an e-mail or a text or something like
24 that?

1 MR. KAUFMANN: Well, Your Honor, I
2 think that the conversion does require a
3 deprivation of the property and so just by
4 receiving a copy of electronic documents via
5 e-mail or some other electronic conveyance, no,
6 I don't believe there is a way that that could
7 be converted as long as the owner of that
8 property retained a copy of it. I think you
9 correctly summarized that instances of
10 conversion of electronic documents could occur
11 in instances like where the documents are stored
12 on a physical hard drive and the hard drive is
13 taken or, yeah, the files were withheld from the
14 owner, I believe is one of the cases. What was
15 discussed in the briefing dealt with a situation
16 where a party developed software that was, you
17 know, stored on a computer hard drive and then
18 didn't turn it over to the party that had paid
19 for it.

20 THE COURT: Right. Like if two
21 parties entered into a contract and the
22 defendant is supposed to develop and create
23 software for the plaintiff, but the allegation
24 is defendant never gave this software to the

1 plaintiff, you know, that's if you have
2 electronic information or software that can be
3 properly said to be alleged to be converted, but
4 you would say it's an example where the entirety
5 of that information is in the defendant's
6 possession?

7 MR. KAUFMANN: Correct.

8 THE COURT: Okay. And then I
9 guess just thinking about it, how come there
10 can't be a deprivation of property regarding
11 electronic documents when an owner or plaintiff
12 retains a copy? Isn't it -- couldn't it be said
13 that the owner is deprived of sole possession of
14 the electronic documents in that situation, even
15 if they're not deprived of total possession of
16 the information?

17 MR. KAUFMANN: No, Your Honor, I
18 don't believe there could be. You know, the
19 only, I think, potential scenario I could see
20 where there could be a deprivation where the
21 owner of the files retained a copy could be in
22 the scenario where the information was the basis
23 of a patent. But as Your Honor knows, the
24 original conversion claim in this case was based

1 on that, that Lancium converted BearBox's
2 property by patenting it. And Your Honor, you
3 know, correctly found that that claim was not
4 viable and dismissed that claim. And so now the
5 basis of this conversion claim is something
6 different than that. Right? I mean, the
7 allegations are no longer that the property was
8 converted into a patent whereby Lancium would
9 have the ability to prevent, you know, someone
10 else from using their patented technology. As
11 long as BearBox had a copy of their electronic
12 files, they can do whatever they want with it.
13 And again, that property, the basis of the
14 conversion claim is something different than
15 what is the subject matter of the patent that
16 their enrichment claims relate to.

1 copy of it and the plaintiff can claim that the
2 defendant converted their property. Isn't that
3 right? Isn't that -- isn't that, from what
4 you're arguing, you can't have a conversion
5 claim under Louisiana law in your view if each
6 side keeps a copy, if each side ends up with a
7 copy of the allegedly converted electronic
8 material, is that right?

9 MR. KAUFMANN: I think that is
10 correct, Your Honor. And that, you know, I
11 think what the CamSoft case found, you know,
12 explicitly, that, you know, they quoted the
13 Louisiana supreme court Binn case, cited to the
14 Binn, says that a conversion requires a case of
15 possession. And, for example, in CamSosft there
16 was no deprivation because the owner of the
17 property retained copies of their information
18 and so there could not be a conversion.

19 THE COURT: And then last question
20 for you that I had, the Louisiana law, as both
21 sides note, lists out the seven kind of possible
22 examples of conversion. And in describing what
23 those things are, again, you say that they each
24 involve depriving the owner of possession or the

ability to use its property. I guess my
question is how is that true with example number
seven, which is referred to as ownership is
asserted over the channel. Can't you have a
scenario where you have a conversion claim where
a party claims that they own certain property
but nevertheless, it physically remains -- also
remains in the hands of the plaintiff?

9 MR. KAUFMANN: Well, Your Honor, I
10 don't believe you could have that scenario where
11 there would be a situation other than, you know,
12 the scenario I mentioned before, where the --
13 you know, we're talking about the subject of a
14 patent. You know, the Louisiana supreme court
15 has been clear that, you know, the basis of a
16 conversion claim, in the Import Sales case the
17 supreme court was explicit that the gist of a
18 conversion has been declared not to be the
19 acquisition of the property by the wrong does,
20 but the wrongful deprivation of a person of the
21 property to the possession to which he is
22 entitled. And the only way to assert ownership
23 over property that would deprive the owner of
24 that ownership would be to have physical

1 possession of it, unless there was some legal
2 mechanism to preclude them from using that
3 property. And I think the only legal mechanism
4 that could be would be a patent. And Your Honor
5 has already found that that can't be the basis
6 of a conversion claim.

7 THE COURT: Taking it out of the
8 electronic information context, though, let's
9 say think about just a physical item, like a
10 car. Let's say a plaintiff on its property has
11 a car and a defendant says, hey, that's my car.
12 I don't have the physical car, but I think
13 that's my car. And the defendant maybe goes and
14 files some type of legal claim in Louisiana
15 trying to convince somebody that the car is the
16 defendant's, but the plaintiff says, that's
17 totally false, this is my car. The defendant is
18 asserting ownership of this physical thing that
19 I still possess, but I think defendant's
20 converted it or maybe defendant is successful
21 with their legal challenge if they converted it.
22 Can't you have -- in the physical realm, can't
23 you have a physical conversion claim where you
24 assert ownership of something even though the

1 thing is still in the possession of the
2 plaintiff?

3 MR. KAUFMANN: Well, I don't think
4 in that scenario that could be a conversion,
5 because if there was a legal claim that was
6 filed, you know, asserted against ownership of
7 the claim and it was successful, then, you know,
8 then the claimant prevailed and there would be
9 no wrongful taking or you know, and if they --
10 if they were unsuccessful, then there was no
11 interference with the property either. So
12 there, Your Honor, I don't believe there's any
13 mechanism. I guess the one example of depriving
14 the property owner of ownership would be in a
15 situation like what we discussed earlier where,
16 you know, developing the software and not
17 turning it over to the owner could be an example
18 of interfering with ownership, but there there's
19 still a deprivation.

20 THE COURT: Okay. Mr. Kaufmann,
21 is there anything more you want to say about
22 this conversion issue before I turn to your
23 colleague on the other side?

24 MR. KAUFMANN: Your honor, the

1 only final point I would make on that is I think
2 the CamSoft case is wholly precedent here and
3 dealt with this issue, you know, nearly
4 identical issue and concluded that there could
5 be no conversion of electronic documents where
6 there is no deprivation of the property owner.
7 And under CamSoft, I think BearBox's claim
8 necessarily fails for identical reasoning that
9 there is simply no deprivation here because
10 BearBox at all times retained a copy of the
11 allegedly converted property and the ability to
12 use it.

13 THE COURT: Okay. All right.
14 Thank you. Let me turn to plaintiff's counsel.
15 And Mr. Horton I know is going to take this
16 issue. And Mr. Horton, I'll start out where the
17 defendant's side left off. If they say hey,
18 look, we have a Louisiana state court case that
19 we think pretty clearly addresses this issue
20 and, you know, of course no case is a hundred
21 percent the same facts, but basically pretty
22 clearly says that, you know, when it comes to
23 electronic information, you know, can electronic
24 information be converted? Yeah, but what we

would have to see is someone physically taking possession of that electronic information of the plaintiff's and depriving them of it. And if you simply had a scenario where the electronic information was transmitted from a plaintiff to a defendant, but the plaintiff kept a copy, defendant says that CamSoft kind of indicates that that wouldn't cut it. In your brief you cited some cases in support of your conversion claim, but do you have a Louisiana state court case that's about a conversion claim that really strongly supports your position?

13 MR. HORTON: Yes, Your Honor.

14 Well, first, if I could address quickly the
15 CamSoft decision.

16 THE COURT: Sure.

17 MR. HORTON: The CamSoft decision
18 was a summary judgment decision, Your Honor.
19 And what the court found was there wasn't
20 sufficient evidence and denied summary judgment
21 on that basis. It did not contemplate the
22 pleading standard for conversion under Louisiana
23 law, which is what we're talking about here in
24 the instant motion, Your Honor.

1 The other thing I'd say about
2 CamSoft is the CamSoft court also held that
3 software was not protectable under Louisiana
4 conversion law, which is something that has been
5 rejected by the Louisiana supreme court and
6 Lancium itself acknowledges is incorrect in its
7 reply brief. And so if we're debating the
8 correctness or applicability of CamSoft, I think
9 both of those points are important and worth
10 noting. In terms of --

1 it. In a summary judgment decision that can be
2 useful for a motion to dismiss. I guess if
3 everything I'm saying is correct and I think it
4 is, how come, you know, you may disagree with
5 CamSoft for other reasons, but why is it the
6 fact that the summary judgment decision is
7 irrelevant here?

1 THE COURT: Okay. All right. And
2 then back to the question about, you know, the
3 case law that you cite. Do you have a Louisiana
4 state court case regarding conversion that you
5 think is pretty applicable on the facts?

6 MR. HORTON: Well, I think first,
7 Your Honor, I would go to the Louisiana supreme
8 court decision in their discussion as to what
9 constitutes conversion. We've been talking
10 about the Dual Drilling case, the Dilio case
11 where the supreme court laid out the seven acts
12 that would constitute conversion. I think Your
13 Honor is exactly right in pointing to, for
14 example, the seventh action where the Louisiana
15 supreme court I think very intentionally chooses
16 the word ownership, you know, for instance,
17 separate from possession to illustrate that
18 concept. I also think it's important to note
19 that act number four, possession of, withheld
20 from the owner or possessor. That's exactly the
21 one act of conversion that I think Lancium is
22 trying to expand or I guess consolidate all acts
23 of conversion into, just number four, when the
24 others are much broader, including number one,

1 Your Honor, where it says possession is acquired
2 in an unauthorized manner.

3 THE COURT: Just to jump in. You
4 know, when I read the seven examples, you know,
5 I saw it in your brief that you were trying to
6 say like, well, four is an example of when you
7 physically take something from another person,
8 you know, and they don't have it anymore, but
9 look at all these others. But when I read them,
10 I don't know, it seems like all or almost all of
11 them are meant to be talking about examples of
12 just that. You know, like number one,
13 possession is acquired in an unauthorized
14 manner. Well, I acquired possession, I took the
15 thing, you don't have it anymore. Number two,
16 the channel is removed from one place to
17 another, with the idea that you're going to
18 exercise control over it. I took the thing. I
19 have it. You don't have it anymore. Number
20 three possession of the channel is transferred
21 without authority. It's transferred, now I've
22 got it. You don't have it anymore. You know
23 what I mean? So I don't understand why -- why
24 is fourth only one of the possible conversion

1 scenarios that deals with the physical obtaining
2 of an item without the other side having it?

3 MR. HORTON: I think, Your Honor,
4 the fact that it is explicit I think is
5 acknowledgement that each of those other
6 scenarios could have a situation where there's a
7 dual possession or a partial possession. And so
8 the fact that it is laid out explicitly, I
9 think, acknowledges that those other
10 possibilities exist. For example, number six,
11 the channel was used improperly. Well, that
12 doesn't say who is possessing the channel at the
13 time, just that it's being used improperly.
14 Your Honor had the example about a car where
15 someone is making the argument that that's my
16 car. The plaintiff says no, it isn't. I can
17 imagine other scenarios where someone is trying
18 to take out a loan as collateral on someone
19 else's house. They say it's their house. Well,
20 the plaintiff at all times had possession of
21 their house. So there's all kinds of these
22 examples that we think up and I think the
23 Louisiana supreme court was explicit when
24 articulating number four and saying that that

1 alone is an act, but it's not necessarily
2 required for any of the others. And I think
3 it's also important, Your Honor, to look at, you
4 know, what the supreme court says when it
5 summarizes those seven acts. You know, I think
6 in defendant's brief they used the word
7 deprivation in an argument today. Deprivation
8 is the word that's used, but the full quote from
9 the Louisiana supreme court is conversion
10 consists of an act of deprivation of the
11 plaintiff's possessory rights, comma, and
12 deprivation is impairment or interference. But
13 it goes on to say and any wrongful exercise of
14 assumption of authority over another's goods
15 depriving him of a possession permanently or an
16 indefinite time is a conversion. What you've
17 got there, Your Honor, is sort of that first
18 statement of an act of deprivation as a
19 conversion and then where it gives an example of
20 a conversion. And I think that's more
21 consistent with how the supreme court has laid
22 out these seven types of conversion, an act of
23 deprivation, interference with the plaintiff's
24 possessory rights and I think that it makes

1 sense that in the electronic context an
2 interference with the plaintiff's possessory
3 rights would be interference or elimination of
4 exclusive possession of electronic information,
5 right? It seems to flow that it would be
6 actionable or should be actionable under
7 conversion if a defendant has, for example,
8 taken a customer list or a schematic on how to
9 build a product and then used that information
10 to compete unfairly with the plaintiff who
11 possessed those things and still would possess
12 those things, you know, unlawfully taking
13 profits and sales away from that plaintiff. I
14 think that's exactly the type of act where
15 there's dual possession that would be actionable
16 under conversion. And in fact, there are
17 decisions that we've cited to in the briefing
18 that contemplate exactly that. The Mayville
19 decision, Your Honor, and explicit when it talks
20 about copied the schematic and used it to
21 compete unfairly and illegally with the
22 plaintiff.

23 THE COURT: Do you think in
24 Mayville it's clear from the case that the owner

1 retained a copy of the information?

2 MR. HORTON: I do, Your Honor.

3 THE COURT: Okay. And then in
4 terms of the -- just one more question about the
5 way the supreme court explains the tort. I
6 talked about number seven with the other side.
7 Are you asserting -- are you saying in your
8 complaint that in some way the defendants
9 asserted ownership over the channel, which I
10 guess here is the electronic information that
11 passed between -- from plaintiff's side to
12 defendant's side? And if you are, in what way
13 did they assert ownership of it?

14 MR. HORTON: I think we are, Your
15 Honor. I think there's -- I think we
16 articulated in the briefing there's at least
17 four acts under Louisiana supreme court law that
18 we pled as actionable. Ownership I think is one
19 of them and that would be in the way in which
20 the defendants have taken the electronic
21 information and asserted ownership in terms of
22 modifying their business practices, soliciting
23 and obtaining investments in their business
24 based on their ability to practice the methods

1 and really making money off of it, Your Honor.
2 They've asserted ownership over the information
3 that way.

4 And if I could direct the court to
5 a specific cite from Mayville to answer that
6 question, Your Honor. It's to page 1 actually
7 of the decision. And the quote is, the
8 plaintiff left a schematic drawing with the
9 defendant and later e-mailed a digital copy of
10 the drawing. So that case actually contemplates
11 exactly what we are a talking about here,
12 e-mails the schematic and of course necessarily
13 retaining a copy.

14 THE COURT: Okay. And I guess
15 lastly and more broadly, you know, how can it be
16 said that the defendant impaired the plaintiff's
17 possessory rights to the electronic information
18 if in the end the plaintiff still possessed the
19 electronic information? Is the answer that,
20 well, the definition of conversion is broader
21 than impairing possessory rights or is the
22 answer, well, they impaired our possessory
23 rights because we no longer had sole possession
24 of the information?

1 MR. HORTON: Yeah, I think that's
2 one important articulation, Your Honor. By
3 impairment by impairing the exclusive possession
4 of that information, going back to the example I
5 gave of a competitor acquiring a schematic. Now
6 both competitors have the schematic, but
7 previously the second competitor didn't have it,
8 now they have it, they're making a competing
9 product and now the market is split in purchases
10 of that product where otherwise it wouldn't have
11 that.

19 MR. HORTON: There are other
20 decisions, Your Honor, that contemplate dual
21 possession of electronic information that I'd be
22 happy to draw the Court's attention to. One is
23 called Total Safety. It's 2019 WL 5964971. And
24 of course they also cited Buena Vista is another

1 case that's in the briefing, Your Honor. I
2 think that was defendant's took issue with that
3 in the reply brief saying that the allegations
4 actually were that the electronic information
5 was copied but then the original version was
6 deleted. But that's actually not what happened
7 in Buena Vista. The conversion allegation was
8 that information was copied put in archive and
9 then a separate allegation of conversion was
10 that different information was deleted from the
11 plaintiff's server, so I wanted to make that
12 clarification for the Court.

13 THE COURT: I think you're talking
14 about Euro Veritas, am I right?

15 MR. HORTON: I'm sorry, yes.

16 THE COURT: Okay. Got it. Let me
17 go back to Mr. Kaufmann. Anything you want to
18 say by way of brief rebuttal on the conversion
19 issue?

20 MR. KAUFMANN: Yes, Your Honor.
21 One, I'd point out that the Mayville case
22 predates CamSoft by three years maybe. It was a
23 2016 decision, CamSoft was from 2019. And of
24 course Mayville was an Eastern District of

1 Louisiana case which is not controlling
2 authority where of course CamSoft is. And Your
3 Honor, the total safety case Mr. Horton just
4 mentioned I don't believe is cited in the
5 briefing, so I don't believe that's an
6 appropriate authority to assert for the first
7 time in this argument.

8 THE COURT: I agree. If there are
9 cases that the parties find after they submitted
10 the briefing that they think are particularly
11 helpful, we have a way to do that which is to
12 file another supplemental brief if it's
13 something that, that's new. And if it's not,
14 you know, there should at least be a way to try
15 to give the other side a fair chance to respond
16 to it if they haven't heard it before, so I
17 understand your point there.

18 Okay. Let's move on to the unjust
19 enrichment issue. And again, I'll turn to
20 defendant's side first. And I guess, Mr.
21 Kaufmann, there there are two arguments you're
22 making, if I'm seeing it correctly, as to why
23 this claim should be dismissed. One is that the
24 plaintiff can't satisfy the fifth element, that

1 there be no other adequate remedy in law and the
2 second is the preemption claim. If you are
3 correct on either one of them, you prevail, am I
4 right about that?

5 MR. KAUFMANN: Yes, Your Honor.

6 Although actually I believe the first point that
7 BearBox can't establish the fifth element
8 applies no matter what. The preemption issue is
9 really just to -- we included that to address I
10 think a potential argument or an ambiguity that
11 I don't believe BearBox has actually asserted,
12 which is if they were to assert that their
13 unjust enrichment claim was based on
14 non-confidential information, the briefing
15 doesn't state that, doesn't make that assertion.

16 THE COURT: The presumption
17 affirmative defense only relates to the extent
18 that the claim is meant to refer to
19 non-confidential information that was passed
20 along and I think right now you're saying you
21 don't actually think that's what the plaintiff
22 is alleging, but just in case they are, if they
23 were, you would have a preemption argument?

24 MR. KAUFMANN: That's correct.

1 THE COURT: Okay. I guess on the
2 preemption issue, just briefly since we're
3 talking about it, how come this -- you know, and
4 the briefing basically, just for the record the
5 briefing basically kind of is a dispute about
6 whether federal circuit law permits an unjust
7 enrichment claim outside of the alleged, you
8 know, enrichment with regard to confidential
9 information that may have been shared in a quasi
10 contract way. And I think you acknowledge that
11 federal circuit has said that, look, there can
12 be some circumstances if a plaintiff is alleging
13 that the defendant was unjustly enriched, even
14 in the patent world when it comes to information
15 that was provided based on the promise of
16 confidentiality, there can be ways in which that
17 kind of a claim can survive. But you say
18 otherwise in a circumstance like this where
19 we're dealing with a case of this nature, if
20 it's non-confidential information that's
21 transferred, federal circuit law just would not
22 let you make an unjust enrichment claim. Is
23 that right??

24 MR. KAUFMANN: That's correct,

1 Your Honor. There may be scenarios where an
2 unjust enrichment claim could be based on
3 confidential information, but not -- there can
4 not be a situation where a conversion claim or
5 I'm sorry, an unjust enrichment claim is based
6 on use of non-confidential information, that
7 wouldn't be preempted.

8 THE COURT: And how come this
9 confidential/non-confidential distinction didn't
10 come up the last time when we were having the
11 motion to dismiss arguments about this kind of a
12 claim?

13 MR. KAUFMANN: Well, Your Honor,
14 because I think the nature of the allegations
15 were just different previously. In the first
16 amended complaint the allegations were that the
17 patent, you know, what was patented was
18 BearBox's technology and that the unjust
19 enrichment was the incorporation of that
20 technology into the patent. And that is -- a
21 claim of that nature is preempted separately
22 from the confidentiality issue. The claim is
23 directly tied to whether the patent is the, is
24 the basis of the unjust enrichment.

1 THE COURT: Okay. I mean, going
2 back and re-reading the briefing and the
3 decision last time, it seems like the issue
4 there just really solely turned on, you know,
5 was the allegation in the complaint, one, as to
6 this unjust enrichment claim, that it turned on
7 an assertion of inventorship and if it was, in
8 my decision I highlighted a bunch of paragraphs
9 where it seems like that's exactly what the
10 plaintiff was saying, saying in my unjust
11 enrichment claim, it's all about the real
12 inventor. They're not. And if so, that
13 implicated defense's preemption. Isn't that
14 what was going on last time? And I guess, if it
15 was or if it wasn't. Okay. Go ahead.

16 MR. KAUFMANN: And the preemption
17 issue there was federal patent law governs
18 inventorship and so that was the basis of the
19 preemption of the prior alleged claim.

20 THE COURT: Okay. But maybe the
21 alleged thing is slightly differently now and so
22 we're getting a different argument for a motion
23 to dismiss the claim on preemption grounds, is
24 that right?

1 MR. KAUFMANN: That's correct.

2 THE COURT: Okay. And then you
3 also pointed -- on the preemption issue, you
4 pointed to the third circuit case Warinski and I
5 know you distinguish it in in part by saying you
6 don't think the case dealt with whether the
7 information at issue was allegedly confidential
8 or not. But otherwise, do you think the case
9 just got it wrong? Do you think that the third
10 circuit just kind of misinterpreted federal
11 circuit precedence?

12 MR. KAUFMANN: Your Honor, I think
13 they did. In fact, the Warinski case doesn't
14 even mention the Walter's case that dealt
15 with -- I'm sorry, not the Walter's case, the
16 federal circuit precedent on preemption. Ultra
17 Precision.

18 THE COURT: Okay. And then just
19 on the other issue, which would I guess be
20 entirely dispositive of the claim no matter what
21 confidential or non-confidential information is
22 at issue, there's no -- you know, dispute really
23 turns on like a case like Walters where the
24 supreme court has made it clear that, that when

1 it comes to this development, if there is an
2 adequate remedy at law, even one that the
3 plaintiff ultimately is successful on, you can't
4 make an unjust enrichment claim. And I guess,
5 is the way that, you know, that there is an
6 adequate remedy of law otherwise that the
7 plaintiff pleads such a remedy in a complaint?
8 Is that how you know that one exists or are
9 there other ways that you would know?

10 MR. KAUFMANN: Well, Your Honor, I
11 think there are potentially other ways that you
12 could know. I suppose you could, even if there
13 was an unpled claim, the allegations in the
14 complaint satisfied the elements of an unpled
15 claim, that could be a situation again where the
16 unjust enrichment claim couldn't proceed.
17 Although, you know, here the trade secret claims
18 that were stricken, you know, again, are based
19 on the same conduct as the unjust enrichment
20 claim. And, in fact, the trade secret claim
21 pled unjust enrichment as alleged harm from the
22 trade secret misappropriation. And so, you
23 know, those claims are clearly based on the same
24 conduct and the same with the conversion claim.

1 And, Your Honor, courts that have dealt with
2 this issue like the Shaw case have found that,
3 you know, it's not whether -- even if the claim
4 fails as a matter of law, you know, the Shaw
5 case found that two other claims based on the
6 same conduct should also be dismissed as a
7 matter of law, but the allegation of those
8 claims based on the same conduct as the unjust
9 enrichment still precluded the unjust enrichment
10 claim.

11 THE COURT: And just to parse
12 that, you know, like what it means to have an
13 alternative remedy at law. Let's say I had a
14 complaint and there was like five claims and the
15 last of which was unjust enrichment and they
16 were all about the same conduct. You know,
17 like, number one was breach of contract, number
18 two was conversion, three, four, whatever, and
19 then five is unjust enrichment and the defendant
20 moves to dismiss -- and they're all under
21 Louisiana law -- and defendant moves to dismiss
22 all five and the Court looks at them and says,
23 you know what, not one is dismissed. The
24 plaintiff can't make out a plausible claim.

1 Count two, dismissed as well. Plaintiff just
2 simply cannot make out a plausible claim. Same
3 with count three, same with count four and then
4 you get to count five and you ask yourself, does
5 the plaintiff have a, you know, an alternative
6 remedy at law? Well, from the one hand the
7 plaintiff pleaded that they did. You know, they
8 pleaded four other claims based on the same
9 basic conduct, but that the Court that's
10 deciding whether they do just got through saying
11 they don't. You know, they -- like the court
12 looked at it and plaintiff can't make out a
13 claim under count one, breach of contract or
14 count two conversion. If you have a scenario
15 like that, how can it be said that there is an
16 adequate remedy at law if the Court says, as to
17 all the other things the plaintiff tried, no.

18 MR. KAUFMANN: Well, Your Honor,
19 that's the guidance that the Louisiana supreme
20 court has given and that's the scenario that the
21 Court found in Shaw. Although here, I think we
22 don't even need to get to that question, because
23 the trade secret claim, you know, as Your Honor
24 knows, those claims were not dismissed because

1 they failed to plead an adequate trade secret
2 claim. They were stricken because they were
3 untimely, so there's not an issue of whether
4 other claims could be pled that set forth a
5 viable claim. And in fact, in their briefing on
6 the motion to strike I believe BearBox was
7 adamant that they had adequately alleged the
8 elements of a trade secret claim and so because,
9 you know, that claim could have been available
10 to them, we don't -- we don't even need to get
11 to the issue of, you know, if the conversion
12 claim is stricken could that -- is there still a
13 claim they could have availed themselves of.
14 There is and it was the trade secret claims, at
15 least.

16 THE COURT: Okay. Anything
17 further you want to say on this unjust
18 enrichment issue, Mr. Kaufmann?

19 MR. KAUFMANN: No, Your Honor.

20 THE COURT: Okay. Let me then
21 turn to Mr. Horton on plaintiff's side with
22 these issues and why don't we start with the
23 fifth element issue. There I guess, you know,
24 why doesn't Walter's just settle the issue? The

1 supreme court case from Louisiana supreme court.
2 The other side says it pretty clearly, in their
3 view, says that, look, if you plead another type
4 of claim based on the same basic content as an
5 unjust enrichment claim, even if that other
6 claim gets dismissed, you had an alternative
7 essential remedy. And so you can't plead the
8 fifth element. And the defendant would say,
9 heck, even in the recent case, federal cases
10 recognize that too like Andretti or Cytogel
11 Pharma. How comes Walters doesn't just settle
12 the issue?

13 MR. HORTON: Yes, Your Honor. I
14 think we recognize in the briefing there seems
15 to be a split in authority here. We recognize
16 the Walters decision, but there are decisions
17 subsequent to Walters and the Hall case
18 addresses Walters and distinguishes it. And the
19 split seems to be, Your Honor, federal court
20 versus state court and we think that makes sense
21 here because in federal court, now federal rule
22 civil procedure 8 which allows for pleading in
23 the alternative. And so we think because we're
24 in federal court with this case that the split

1 in authority should give, allow the unjust
2 enrichment claim to go forward.

3 THE COURT: I guess just to stop
4 you there, Mr. Horton. You mentioned Hall as
5 distinguishing Walters, but the way it
6 distinguished Walters, not even sure this is a
7 correct reading of Walters, but the way it
8 distinguished it was by saying well, Walters was
9 only talking about a scenario where the
10 alternative relief was a tort claim. And then
11 it went on to talk about how that wasn't the
12 case in Hall. Here, even if the way that Hall
13 was distinguishing Walters wouldn't help you,
14 right, because you've got alternative tort
15 claims that you're pleading, isn't that right?

16 MR. HORTON: That was said in the
17 Hall case, Your Honor, that's correct. The Hall
18 case also went on to say that the liberality of
19 rule 8 should be recognized and the Hall case
20 cites to the Richard versus Wal-mart case which
21 again relies on rule 8 which allows for pleading
22 in the alternative in federal court.

23 THE COURT: And on the rule 8
24 issue a number of cases that you cite reference

1 rule 8. But I mean, you know, there are cases
2 that the other side points to that say, and I'm
3 not sure why this is wrong, whether rule 8 or
4 rule 9 is a matter of federal procedure allows a
5 party to plead in the alternative, that doesn't
6 have much to do with what's the substance of the
7 elements of the claim under state law. And if
8 the substance of an element of the claim was
9 that you can't have another form of potential
10 relief, it wouldn't matter what rule 8 or 9 lets
11 you do because the actual substantive claim
12 wouldn't permit a scenario like this. How does
13 rule 8 or 9 get you out of this problem?

14 MR. HORTON: Yeah, so I think,
15 Your Honor, you alluded to this earlier, which
16 is to say that, you know, how do you know which
17 cause of action is going to provide for the
18 remedy the plaintiff seeks until you know? And
19 at the pleading stage we don't know. And so I
20 think, you know, for conversion I think we feel
21 that the remedy is a disgorgement of the
22 defendants ill gotten gains and we think we're
23 entitled to that under conversion. But if it
24 turns out that that's not right, then unjust

1 enrichment is meant to plug a gap in the law in
2 terms of remedies in what the plaintiff might
3 recover. And so until we know that for sure, I
4 think our positions is that unjust enrichment
5 should stay in the case to continue to plug that
6 potential gap, until we know for certain whether
7 there's a gap or not. And I think that's what
8 rule 8 contemplates in the federal procedure
9 context.

10 THE COURT: All right. And with
11 regard to the preemption issue, I guess one
12 question I have for you is the other side is
13 only making that argument to the extent that
14 your unjust enrichment claim is even alleged to
15 implicate information that is non-confidential.
16 You could tell me that the answer to that is no,
17 actually no, the whole claim is about
18 information that is asserted to have been
19 confidential on the plaintiff's side. Is that
20 what's going on or does your unjust enrichment
21 claim also implicate some information that
22 wasn't confidential?

23 MR. HORTON: Well, Your Honor, I
24 think the claim certainly does contemplate

1 information that is confidential. I think we've
2 said that in the pleading. I think we said that
3 in the briefing. At the pleading stage I would
4 be hesitant to make a representation whether
5 it's all constitutes confidential or not. And I
6 don't think the Court needs to reach that
7 conclusion, because the Rosinski case is on
8 point and it doesn't contemplate confidentiality
9 at all, it's simply saying that in order to
10 avoid preemption you simply just cannot seek a
11 patent-like remedy based on patent infringement.
12 And we don't have that here. We're not seeking
13 patent infringement damages. We don't even have
14 a patent. I think we're contending that we
15 should have the patent, but we don't yet. And
16 in Warinski the facts are even less favorable to
17 the plaintiff there because there the plaintiff
18 did have the patent and the third circuit said
19 as long as you're not asking for patent
20 infringement damages then unjust enrichment
21 cannot and will not be preempted. So I think
22 that's really the only issue that the Court
23 needs to address.

24 THE COURT: And so I guess you're

1 saying -- is what you are saying to me, yes,
2 Judge, you should understand the unjust
3 enrichment claim to be alleging the unjust
4 enrichment of the defendants with regard to both
5 confidential and non-confidential information,
6 is that right?

7 MR. HORTON: I guess what I'm
8 saying, Your Honor, is I think the Court's
9 decision doesn't need to parse things that
10 finely. It can simply be a decision based on
11 the fact that the plaintiff is not seeking at
12 like remedies under unjust enrichment and on
13 that basis cannot be preempted by patent law.

14 THE COURT: I'm asking partly from
15 an efficiency perspective because if you told me
16 the only thing you're alleging was used and
17 generated unjust enrichment was confidential
18 information, then, you know, I don't have to
19 make a decision on a whole big part of the
20 briefing here. But if you're telling me the
21 opposite, then I might, so that's why I'm
22 asking.

23 MR. HORTON: Understood, Your
24 Honor.

1 THE COURT: So humor me, which one
2 is it?

3 MR. HORTON: Fair enough, Your
4 Honor. Confidential information.

5 THE COURT: So only confidential
6 information is being alleged to have been used
7 in a way that unjustly enriched the other side?

8 MR. HORTON: I think the pleading
9 is broader than that, Your Honor, but that's the
10 claim I see going forward, is unjust enrichment
11 based on confidential information.

12 THE COURT: Okay. All right.

13 Anything further you wanted to add, Mr. Horton?

14 MR. HORTON: No, Your Honor.

15 THE COURT: Okay. All right. Mr.
16 Kaufmann, anything more you want to say about
17 the unjust enrichment issue?

18 MR. KAUFMANN: Your Honor, I'd
19 just reiterate the point Your Honor noted that
20 controlling precedent here, Walters in the
21 Louisiana supreme court and the fifth circuit
22 precedent have established that unjust
23 enrichment can not be pled in the alternative.
24 Here, rule 8, federal rule 8 does not save the

1 claim as you noted. It is a substantive element
2 of the claim that there can be no other remedy
3 at law and here BearBox's own allegations show
4 that there was other claims they could have
5 availed themselves of and so here the unjust
6 enrichment claim just can't be sustained.

7 THE COURT: Okay. All right.

8 Thanks, counsel. Appreciate your arguments.
9 I'll take a short time to think about it and
10 then I'll intend to issue a short report and
11 recommendation in the very near future so that
12 the parties will have an answer here.
13 Appreciate everyone's time today. Wish everyone
14 continued health and safety. Unless there's
15 anything further, we can end our teleconference
16 today and go off the record. Take care,
17 everybody.

18 (End at 1:58 p.m.)

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1 State of Delaware)
2)
2 New Castle County)

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5 CERTIFICATE OF REPORTER

6

7 I, Stacy M. Ingram, Certified Court Reporter
8 and Notary Public, do hereby certify that the
9 foregoing record, Pages 1 to 47 inclusive, is a true
10 and accurate transcript of my stenographic notes
11 taken on May 23, 2022, in the above-captioned matter.

12

13 IN WITNESS WHEREOF, I have hereunto set my
14 hand and seal this 23rd day of May 2022, at
15 Wilmington.

16

17

18

/s/ Stacy M. Ingram

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